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WHEN THEORY MET PRACTICE: DISTRIBUTIONAL ANALYSIS IN CRITICAL CRIMINAL LAW THEORIZING

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INTRODUCTION

Modern critical race theorists, at least in the legal realm, often find themselves torn between two venerable, but inconsistent, traditions. On the one side is the critical legal studies paradigm, which incorporates an acute skepticism of law, legal formalism, and rights constructs and instead seeks to expose the deep structures (institutional, discursive, and social) of racial and other hierarchies.¹ On the other side is the civil rights framework, which views racial justice through a lens of equal rights and the legal frameworks erected to achieve them.² The tensions between formalism and anti-formalism, individualism and structuralism, and liberalism and socialism manifest frequently in critical race theorizing.³ For example, while critical race theory embraces identity-based rights frames, when such frames prove constraining to substantive racial justice, theorists are eager to open up the notion of identity to intersectional and identity performance analyses.⁴ The same tensions play out more openly in feminist legal theory,

* Professor of Law, University of Colorado Law School. I would like to thank Mario Barnes, Paul Butler, Ming Chen, Amy Cohen, Paul Gowder, Jennifer Hendricks, Marcus Hunter, Angela Onwuachi-Willig, and Ahmed White for their helpful input. Special gratitude is due to Kimani Paul-Emile for inviting me to collaborate in this important symposium entitled *Critical Race Theory and Empirical Methods Conference* held at Fordham University School of Law. For an overview of the symposium, see Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 *FORDHAM L. REV.* 2953 (2015).

1. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012) (setting forth basic principles of critical race theory); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1975) (seminal critical legal studies text); *infra* notes 2–4 and accompanying text.

2. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to e-17 (2012). Some would say that such work is actually “civil rights scholarship.” See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 *S. CAL. L. REV.* 2129, 2164 (1992) (discussing this distinction). 3. See Jerome M. Culp Jr. et al., *Subject Unrest*, 55 *STAN. L. REV.* 2435, 2443 (2003).

3. See Jerome M. Culp Jr. et al., *Subject Unrest*, 55 *STAN. L. REV.* 2435, 2443 (2003).

4. See, e.g., Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J. CONTEMP. LEGAL ISSUES* 701, 701–29 (2001); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139, 140–42.

where liberal feminism battles non-liberal feminisms, like cultural and dominance feminism, over which camp has adequately captured the grand narrative of women's oppression.⁵ When considering the topic of this symposium—how to incorporate empirical methodology into critical race theory—one must bear in mind that critical race theory, itself, is ideologically contested. Before resolving how empiricism might fit into the critical race project, one must engage the issue of the fundamental nature of critical race methodology itself. If the project is solely a liberal one, empiricists should devote efforts to generating data useful in the context of civil rights actions. If the project is a critical one, empiricists should concentrate on demonstrating that the civil rights regime has failed to produce substantive justice.

Focusing on criminal law and procedure in particular, this Article seeks to expose various tensions in critical race theorizing and progressive theorizing more broadly, offer some suggestions for a unifying methodology of critical criminal law analysis, and discuss where empirical study might fit into this new program. Progressive (critical race and feminist) theorizing on criminal law is not only subject to the competing frames of critique and formalism, it also exists within an overarching American criminal law culture that can eclipse both concerns over rights violations and structural injustice. The U.S. penal system has become a “peculiar institution” and a defining governance structure of the American state.⁶ It boasts specific features, such as being driven by spectacular publicized criminal acts, its massive size, its strong racial skew, and its unrelenting political popularity.⁷ Criminal law theorizing in the United States is also peculiar. Much of criminal law discourse, it seems, is subject to a type of ideological capture in which it is natural and typical to assume that criminalization is a valid, if not preferred, solution to social dysfunction.⁸ Thus, while there are a diversity of theories about just criminal liability and punishment, most U.S. criminal legal scholarship is about identifying what is and is not a wrong and proposing ways to address those wrongs through punitive measures.

5. See, e.g., Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32–33 (1987); see also Aya Gruber, *Neofeminism*, 50 *HOUS. L. REV.* 1325, 1331–44 (2013).

6. “Peculiar institution” is a term developed to describe the uniqueness of the American institution of slavery. In recent times, the term has been appropriated to describe other aspects of U.S. law and politics such as racial segregation, prison, and the death penalty. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010); KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956); Loïc Wacquant, *The New 'Peculiar Institution': On the Prison As Surrogate Ghetto*, 4 *THEORETICAL CRIMINOLOGY* 377 (2000).

7. See Aya Gruber, *Duncan Kennedy's Third Globalization, Criminal Law and the Spectacle*, 3 *COMP. L. REV.* 1, 6–8 (2012) (describing reasoning by spectacle as a new form of legal consciousness); *infra* notes 22–32 and accompanying text (discussing the peculiar features of the U.S. criminal system).

8. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 167–93 (2001) (noting the ways in which late twentieth-century punitivity is an embedded culture).

Owing to the clash of liberal and critical modes of reasoning and the fact that currently criminalization is *the* technique of addressing harm, progressive criminal law theorizing manifests some deep internal tensions.⁹ On the one hand, critical race and feminist scholars are by and large vocal critics of the American penal state. The critique primarily comes in the form of observations about the authoritarian criminal justice apparatus's punitive, masculinist nature and disproportionate effects on minority men.¹⁰ On the other hand, much of left-leaning criminal law scholarship involves identifying various crimes against minorities and women (domestic violence, rape, hate crimes, etc.), exposing the lackluster police and prosecutorial responses to such crimes, and calling for reforms targeted toward increasing arrests, prosecutions, convictions, and sentence severity.¹¹ Thus, left-leaning legal scholars are in the contradictory position of regarding the U.S. criminal system as cruel, sexist, racist, and unfair, but investing more power in that very system in the hope of reducing crime against minorities. Moreover, progressive investment in punitive authority may create more than just philosophical tension. Liberal faith in the criminal apparatus as a solution to the problems of racial and gender subordination may serve to legitimize our status quo criminal system, strengthen the discourse of individualism that prevents greater institutional change, and distribute scholarly capital away from emphasizing the structural nature of racial and gender oppression.¹²

I use this Article as an opportunity to endorse a “distributional” method of doing progressive criminal law scholarship that can ease the apparent tension between progressives' laudable desire to address crimes against minorities and their deep concern with the U.S. penal state. Distributional analysis is a term from critical legal studies, third-world approaches to international law (TWAIL), and governance feminism literature. It involves meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time.¹³ This methodology, if widely adopted, would effect a profound change in criminal law theorizing. Currently, much of progressive criminal law scholarship is devoted to exposing that

9. See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

10. See Mari J. Matsuda, *Crime and Affirmative Action*, 1 J. GENDER, RACE & JUST. 309, 319 (1998) (“[T]he criminal justice system is a primary location of racist, sexist, homophobic, and class-based oppression in this country.”); *infra* notes 22–32.

11. See, e.g., sources cited *infra* notes 30–32.

12. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–26 (2009); Dean Spade, *Their Laws Will Never Make Us Safer*, in *AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU* 4–9 (Ryan Conrad ed. 2012).

13. See, e.g., Jorge L. Esquirol, *Legal Latin Americanism*, 16 YALE HUM. RTS. & DEV. L.J. 145 (2013); Janet Halley, *Introduction*, in *GOVERNANCE FEMINISM: AN INTRODUCTION* (Janet Halley ed., forthcoming 2015) (on file with author); Ileana M. Porras, *European Origins, the Doctrine of the Providential Function of Commerce, and International Law's Embrace of Economic Growth*, 107 AM. SOC'Y INT'L L. PROC. 374, 375 n.5 (2013) (discussing TWAIL and distributional analysis).

race- and gender-based crimes occur and may even be a “crisis.” It then proposes generalized ratchet-up reforms to criminal to reduce such crimes or send a message that such crimes matter.¹⁴ Often these claims are not accompanied by evidence that criminalization is an effective method for reducing majority-on-minority crime or by a thorough analysis of the attendant high social and economic costs of increasing policing and punishment.¹⁵ Thus, upon reflection and more careful investigation, it may turn out that such generalized law reforms do not have the intended empirical effects and their intended messages may be lost in translation. Pumped up criminal regimes often serve to punish not the untouchable majority defendant but the minorities ensnared in their webs. Punitive reform may actually harm the marginalized groups it is intended to serve.¹⁶ Criminalization often casts crimes against minorities as the sole products of deviant racist and sexist individuals rather than as products of the social structure in which these individuals operate.¹⁷

Distributional analysis calls for a deeper inquiry into the detection, definition, and description of social problems. More importantly, it requires a very meticulous economics-style evaluation of the costs and benefits of punitive law reform proposals, which ideally brings in all interests relevant to critical theorists (group, individual, philosophical, political, socioeconomic) within a broadened temporal frame.¹⁸ Careful empiricism can help critical criminal theorists identify appropriate sites of scholarly and political activity, with an understanding of the variety of ways in which minorities experience harm and the heterodoxy or homogeneity of such experiences. Thoughtful empirics also can aid in understanding the link between law reform and harm reduction—the demographics of the individuals affected by law reform, how parties involved see their interests, the links between the crime at issue and larger social structures, and the list goes on. However, critical scholars must be careful not to lionize data as objective or untouchable and to retain awareness that scientific knowledge is necessarily produced within the context of value-driven choices.¹⁹ It is people, not data, who tell us something is a crisis, a state of affairs is unjust,

14. See Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. (forthcoming 2015) (describing this phenomenon).

15. See generally Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 J. CRIM. L. & CRIMINOLOGY 1337 (2011).

16. See *infra* note 41.

17. See ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 183 (2000) (asserting that crime control discourse on domestic violence eclipsed critiques of patriarchy and women’s structural inequality); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2202–03 (2000) (noting that criminal law presumes immunity for “those who create an ideological system that makes rape possible”).

18. See *infra* Part III.

19. See THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE (1995); Sheila Jasanoff, *The Practices of Objectivity in Regulatory Science*, in SOCIAL KNOWLEDGE IN THE MAKING 307–37 (Charles Camic et al. eds., 2011); Susanne Krasmann, *Law’s Knowledge: On the Susceptibility and Resistance of Legal Practices to Security Matters*, 16 THEORETICAL CRIMINOLOGY 379, 386–87 (2012); Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY (SUPP. 3) S83, S85 (2011).

or groups are suffering. The best we can do as critics and scholars is to try in earnest to get a lay of the land with deliberate consciousness of the dominant normative frames that shape methodological choices.²⁰ Distributional analysis thus calls on critical empirical scholars to retain skepticism of objectivity, be aware that design choices and data labeling are value laden, and be mindful of critical race, feminist, and other anti-subordination concerns when collecting and presenting data.²¹

The remainder of this Article proceeds in three parts. Part I discusses the phenomenon of “critical criminalization,” that is, when progressive criminal law scholars support harsher criminal laws and greater law enforcement in an effort to aid minorities and to vindicate anti-subordination values. It also posits that criminalization regimes rarely stem from distributional analyses, but rather from scholars’ sincere desire to expose and publicize harms to minorities coupled with the assumption that criminalization is an appropriate response to harm. Part II asserts that this phenomenon demonstrates that progressives can come under the influence of a “punitive impulse” that causes people, when faced with spectacular harm, to hastily and uncritically accept criminal law and formalist penal theory. Part II also exposes the exceptional areas in which progressives have resisted this impulse. Part III describes distributional analysis and explains how the method counters the punitive impulse, carefully catalogues the larger effects of legal reform, and appropriately relies on empirical work to help establish a factual picture. In doing so, Part III sounds a cautionary note that empirical evidence can be more harmful than helpful if it is utilized uncritically, seen as *res ipsa loquitur*, and aggrandized as objective truth.

I. CRITICAL CRIMINALIZATION

Critical race scholars, when looking at the U.S. criminal justice system in the abstract, uniformly agree that there are too many criminal laws, arrests, and individuals under penal supervision.²² Progressive scholars also hold that the system is sexist, racist, elitist, socioeconomically skewed, and unnecessarily sadistic.²³ Critical race theorists have been on the forefront of critiquing the American penal state for its discriminatory nature, whether it is publicizing statistics demonstrating that African Americans bear the

20. See Tor Krever, *Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense*, 34 *THIRD WORLD Q.* 131 (2013).

21. See *infra* Part III.

22. See, e.g., Marie Gottschalk, *The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad*, 34 *LAW & SOC. INQUIRY* 439, 450–51 (2009) (noting that “U.S. penal practices are way out of line with those of other Western countries”); sources cited *infra* notes 22–31.

23. PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 23–40 (2008) (problematizing mass incarceration); *infra* note 27; see also Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown As a Cause of Mass Incarceration*, 9 *OHIO ST. J. CRIM. L.* 133, 133 (2011) (observing that “mass incarceration” describes the “explosion of Americans’ reliance on imprisonment”).

brunt of the public's lust for punishment,²⁴ contextualizing modern racialized policing as part of the "Southern strategy,"²⁵ uncovering unconscious bias in arrest and prosecution,²⁶ or reporting instances of outrageous invidious discrimination.²⁷ Feminists and queer theorists have critiqued the penal system for being a repository of hypermasculinity that generates exaggerated gender performances.²⁸ Liberal political theorists tend to regard the state's ability to inflict pain and suffering on its citizenry as a necessary evil that must be strictly monitored for proportionality and whose costs must be subject to constant scrutiny.²⁹

Today, some of the most compelling critiques of the U.S. criminal system come from political economists and Marxists. Theorists have increasingly viewed criminalization and tough-on-crime rhetoric as an integral part of the United States' late twentieth century economic and political shift toward neoliberalism. Neoliberalism is described as "a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites" by reconceptualizing individualism and capitalism as *moral* imperatives and denigrating distributive justice as encouraging moral failure.³⁰ War-on-crime rhetoric, punitive policies, and political grandstanding on crime were indispensable parts of this political and economic reconfiguration. Depictions of monstrous offenders and opportunistic minority criminals appealed to and reified public sentiment that dysfunction and harm are problems of individual pathology rather than social structure. The war on crime and drugs allowed a conservative government that had disavowed the state's role in solving social problems to be seen as "doing something" about the country's most pressing problems.³¹ Moreover, as Marxist political theorists have noted, the United States' augmented penal authority provided a politically appealing alternative to welfare for managing the denizens of surplus labor, particularly minority labor, in an era of increasing automation and

24. Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 302–04 (2012).

25. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

26. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

27. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004).

28. See, e.g., Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies*, Terry Stops, and *Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (discussing policing and hypermasculinity); Matsuda, *supra* note 10, at 319 (calling the criminal justice system "a primary location of racist, sexist, homophobic, and class-based oppression in this country").

29. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Batoche Books 2000) (1789) (asserting that the "evil" of punishment must be outweighed by its benefits); see also Immanuel Kant, *The Metaphysics of Morals*, reprinted in *KANT: POLITICAL WRITINGS* 131, 155 (H.B. Nisbet trans., Hans Reiss ed., 2d ed. 1991) (calling for proportionality); John Rawls, *Two Concepts of Rules*, in *THEORIES OF ETHICS* 144, 145–48 (Philippa Foot ed., 1967) (noting "all that can be said against" punishment).

30. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 19 (2005); see also Gruber, *supra* note 12, at 618–19.

31. See Gruber, *supra* note 12, at 652; see also BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 202–03 (2011).

migration to overseas and alternate labor markets.³² In short, one would be hard pressed to find a progressive legal scholar with a kind word to say about prosecution within the current American penal state. That is, until it comes to crimes against minorities.

When faced with spectacular violence against minorities—especially violence that reflects and reinforces inequality—progressives, and particularly feminists, are quick to endorse state intervention in the form of increased policing, prosecution, and incarceration, and typically condemn discriminatory leniency.³³ Discriminatory leniency describes the phenomenon whereby defendants, especially white defendants, offend against minorities and women and receive unduly lenient treatment under the law.³⁴ For example, in an effort to express appropriate condemnation of George Zimmerman and ensure that Trayvon Martin’s death was not in vain, racial justice seekers advocated strengthening Florida murder law by eliminating the stand-your-ground doctrine and narrowing self-defense.³⁵ Similarly, many commentators consider domestic violence, rape, and provocation law reform that increased the policing, prosecution, and incarceration of men who commit violence against women to be one of the great, if not the greatest success, of the modern feminist movement.³⁶ The reformation of laws governing gender violence continues to be an enduring site of feminist theorizing and lawmaking.³⁷ Critical scholars lament that

32. See, e.g., Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the “Race Question” in the US*, 13 NEW LEFT REV. 41 (2002); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759 (2005).

33. See *supra* notes 31–32.

34. See Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 COLO. L. REV. 129, 132–34 (2014) [hereinafter Gruber, *Minority*] (discussing “discriminatory leniency”); Aya Gruber, *Race to Incarcerate: Punitive Instinct and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014) [hereinafter Gruber, *Race to Incarcerate*].

35. See Press Release, NAACP, NAACP Responds to Texas A&M Study Showing Danger of Stand Your Ground Laws (June 18, 2012), available at <http://www.naacp.org/press/entry/naacp-responds-to-texas-am-study-showing-danger-of-stand-your-ground-laws> (quoting NAACP President Ben Jealous as stating, “‘stand-your-ground’ legislation does more harm than good”); Sean Lengell, *Black Caucus Members Offer Resolution to Honor Trayvon Martin*, WASH. TIMES INSIDE POL. BLOG (Apr. 4, 2012, 6:46 PM), <http://www.washingtontimes.com/blog/inside-politics/2012/apr/4/black-caucus-members-offer-resolution-honor-trayvo> (noting the congressional black caucus’s call for the law’s repeal); cf. Press Release, ACLU, ACLU Reacts to Murder Charge Against George Zimmerman in Trayvon Martin Shooting (Apr. 11, 2012), available at <http://www.aclu.org/racial-justice/aclu-reacts-murder-charge-against-george-zimmerman-trayvon-martin-shooting> (discussing ACLU support for the outside investigation that led to Zimmerman’s arrest). See generally Gruber, *Minority*, *supra* note 34 (cataloging such responses).

36. See Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267, 302 (2006) (observing the “perceived success of feminist rape law”); Renée Römken, Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers*, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römken, & Marianne Wesson, 10 J.L. & POL’Y 313, 337 (2002) (noting that “the feminist social movement [may] be remembered for its influence on criminal law”).

37. For example, there currently appears to be sustained public fascination with the “crisis” of sexual assault on U.S. college campuses. See e.g., *Breaking the Silence*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/breakingthesilence/> (last visited

feminists have allowed pro-prosecution reforms to trump distributive, economic, and culture-based efforts to combat gender violence and that criminalization essentially “took over” the feminist antiviolence movement.³⁸

In the context of domestic violence reform, it is possible that feminists did engage in a critical distributive analysis of prosecutorial policies, weighing the benefits to women against the drawbacks of criminalization, but perhaps miscalculated the balance. Because white women are virtually immune from the reach of the punitive state, feminists may have assumed that bolstering criminal law would be a relatively cost-free experiment.³⁹ Increased prosecutorial power would distribute in a way as to affect only men—abusive empowered men—leaving women free of any of the harmful residue of increased state penal authority. This assumption, that criminal authority is a friend to women, has been derided by critical race feminists who are acutely aware that the American criminal system’s bias toward women does not necessarily extend to women of color.⁴⁰ Moreover, studies on domestic violence criminal law reform paint an ambivalent picture of benefits to women’s safety, economic security, and social standing and indicate that reform does not just burden socially empowered abusive men.⁴¹ Strikingly, Dr. Lawrence Sherman, the lead investigator of the

Apr. 23, 2015) (*Huffington Post*’s web portal on campus sexual assault news); *see also infra* notes 113–21 and accompanying text.

38. *See* Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 93 (2003) (asserting that criminal law “essentially took over anti-domestic violence efforts”); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 290 (2005) (noting that states channel domestic-violence funds nearly exclusively to law enforcement, leaving inadequate resources for other services to abuse survivors).

39. *See* Amy Farrell et al., *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 J. GENDER RACE & JUST. 85, 85–86 (2010) (“[L]eniency toward women has become an almost accepted phenomenon among scholars studying criminal case processing.”).

40. Cord Jefferson, *Professors Concerned About Boom in Black Female Incarceration*, BET (Mar. 17, 2011, 10:03 AM), <http://www.bet.com/news/national/professors-concerned-about-boom-in-black-female-incarceration.html> (noting that black women are the fastest growing prison population and that black women are eight times more likely to go to prison than white women).

41. Studies reveal that mandatory arrest statutes resulted in marked increases in domestic violence arrests of women, sometimes greater than the increase in male arrests. *See* Carol Bohmer et al., *Domestic Violence Law Reforms: Reactions from the Trenches*, 29 J. SOC. & SOC. WELFARE 71, 78 (2002) (citing Ohio study finding that mandatory arrest law raised female arrest rates far more than male arrest rates); David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 259 (2007) (citing studies). Recent empirical work further evidences that mandatory arrest of the man may actually harm the woman. *See* Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting Vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXPERIMENTAL CRIMINOLOGY 1 (2015); *see also* Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws* (Nat’l Bureau of Econ. Research, Working Paper No. 13,186, 2007) (finding that mandatory arrest laws increase intimate partner homicides).

famous Milwaukee and Minneapolis Domestic Violence Experiments in the 1980s and 1990s, which sparked the widespread adoption of mandatory arrest laws, conducted a follow-up study in 2012 and 2013 of the long-term effects of domestic violence arrest on the Milwaukee victims.⁴² Dr. Sherman found that arrests actually produced negative outcomes:

After 23 years, our follow up study found that victims whose partners had been arrested were 64% more likely to have died than those whose partners had NOT been arrested. These deaths were from natural causes, not violence. For African-American victims, the rate of such death was almost 100% higher for those whose partners had been arrested. For victims who had jobs, the death rate was 300% higher if their partner had been arrested. Because most states have laws that require police to make arrests for domestic violence, they prevent police from testing what may be better ideas.⁴³

An alternative explanation of progressives' intermittent embrace of criminalization is that their analyses do not extend beyond the recognition of a gender- or race-based harm and the assumption that criminal law is appropriate. It is true that a number of the domestic violence reformer pioneers are extremely circumspect about the costs of the criminalization to individuals, society, and the feminist project.⁴⁴ Although early activists regarded intimate partner violence as a widespread problem that both reflected and reinforced women's subordination, many hesitated to fully embrace state criminal intervention and counseled caution.⁴⁵ Nevertheless, today's domestic violence reform advocacy is often inattentive to the broader effects of increased criminalization on women victims in particular, gender equality, and the anti-subordination agenda writ large.⁴⁶ Indeed, progressive scholars frequently jump from the identification of a race- or gender-based harm or social problem to a proposal about how to strengthen the state's criminal response without really contemplating whether lack of criminal law played a significant (or any) causal role in the harm, whether more criminal law will reduce (or increase) the harm, and whether any reduction in such harm will outweigh the secondary costs of the criminalization.

This explanation seems particularly applicable to the stand-your-ground debate. Unlike white feminists who may not see expanding the penal state

42. See Sherman & Harris, *supra* note 41.

43. Interview by Matthew Pryce with Dr. Lawrence Sherman, University of Cambridge, WAMC NORTHEAST PUB. RADIO (May 1, 2014, 5:00 AM), <http://wamc.org/post/dr-lawrence-sherman-university-cambridge-domestic-violence-and-arrests>; see also Sherman & Harris, *supra* note 41.

44. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); see also, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 806–07 (2001); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 443–44 (2003).

45. See SCHNEIDER, *supra* note 17, at 182–88 (discussing the dilemmas presented by mandatory arrest policies).

46. See Gruber, *supra* note 44 at 791.

as bad for women because of white women's relative immunity from policing and prosecution, scholars of color are fairly united in the view that the policing and prosecution in the current U.S. penal system is at odds with racial equality and anti-subordination.⁴⁷ Despite race scholars' jaundiced view of criminal justice, they did not respond to the Zimmerman case primarily by encouraging scrutiny and reform of racially biased neighborhood watch practices. They did not prioritize investigating Sanford's police department and D.A.'s office to determine whether they had engaged in a pattern or practice of race-based discretionary decisions. They did not seek to revise Florida's antiquated six-person jury system, which long has been criticized for silencing minority voices.⁴⁸ Rather, reformers quickly and loudly called for the unequivocal repeal of Florida's stand-your-ground law, thereby generally narrowing self-defense and enhancing the state's ability to arrest, prosecute, and punish individuals for murder.⁴⁹ However, in the rush to repeal stand-your-ground, few reformers acknowledged—or seemed to recognize—that such a legal change would grant more authority to the very police and prosecutors they criticized for exercising their existing authority in a racist manner.

Feminist and race scholars often prescribe generally applicable criminal reforms with the apparent assumption that such laws will affect only or primarily people with the attributes of the horrific, privileged defendants who provoke liberals' ire. However, rules of general applicability apply to populations, not persons, and any prediction about the distribution of their effects must be the product of deliberate study and contemplation. For example, in the George Zimmerman case, racial justice advocates appeared to believe that stand-your-ground's utility to Zimmerman evidenced its inherently racist nature, such that eliminating it, narrowing self-defense, and pumping up murder law would primarily serve to burden whites-who-kill-blacks.⁵⁰ Yet, beyond Zimmerman, who seemed likely to benefit from the

47. *See id.* at 796–98.

48. *See, e.g.*, Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 749 (2010); Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 671–73 (1998); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 517–18 (1997); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 897 (1998).

49. *See* Gruber, *Race to Incarcerate*, *supra* note 34, at 973–78 (discussing progressive commentators' responses to the Zimmerman case).

50. *See, e.g.*, Sarah Childress, *Is There Racial Bias in "Stand Your Ground" Laws?*, PBS FRONTLINE (July 31, 2012, 12:40 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/is-there-racial-bias-in-stand-your-ground-laws/>; Trymaine Lee, *Minister: Latest Teen Murder Shows Stand Your Ground 'Reeks of Racism'*, MSNBC (Nov. 29, 2012, 10:35 PM), <http://www.msnbc.com/msnbc/minister-latest-teen-murder-shows-stand-your-ground> (discussing white gun collector's shooting of an unarmed black teenager); Sean Sullivan, *Four Reasons Why 'Stand Your Ground' Laws Won't Be Repealed*, WASH. POST (July 19, 2013, 10:11 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/19/four-reasons-why-stand-your-ground-laws-wont-be-repealed/>.

doctrine,⁵¹ and some other anecdotal examples, critics did not have any evidence that white racists—and not other types of defendants—are the primary beneficiaries of the doctrine.⁵² In fact, critics called to repeal the doctrine and study it at the same time.⁵³

Once the empirical evidence began trickling in, it materialized that the overall racial picture of stand-your-ground is quite complicated and the doctrine does not necessarily exacerbate the deep racial—and especially gender—disparities in self-defense success rates.⁵⁴ In fact, stand-your-ground may have some strange racial equalizing effect.⁵⁵ One should not be surprised at this finding. Racial bias is not inherent in the stand-your-ground or self-defense law—it is a function of discriminatory application by state actors and jurors exercising discretion. Repealing stand-your-ground makes it more difficult for those who did not retreat to have a defense, but it otherwise leaves intact police discretion to arrest or decline arrest, prosecutorial discretion to charge, and juror discretion to find or not find self-defense.⁵⁶ The racial problems in the Zimmerman case stemmed from Zimmerman’s profiling of Martin, the police’s incredible faith in Zimmerman’s (a murder suspect’s) self-serving claims, the prosecutor’s refusal to acknowledge that Zimmerman had racially profiled Martin, and the jury’s apparent identification with “George’s” distrust and fear of the young black Martin.⁵⁷ Eliminating stand-your-ground leaves all these

51. This is not entirely clear given that Zimmerman waived the immunity hearing and his attorneys did not try a stand-your-ground case. See Gruber, *Race to Incarcerate*, *supra* note 34, at 973.

52. See Childress, *supra* note 50 (quoting Commissioner Michael Yaki as stating that the U.S. Commission on Civil Rights intends to determine whether “SYG statutes by their nature . . . create opportunities for racial bias to enter into the system”); Gruber, *Race to Incarcerate*, *supra* note 34, at pt. III (discussing the lack of empirical evidence that non-stand-your-ground states are more egalitarian than stand-your-ground states).

53. See *supra* note 52.

54. For example, one study compared the justification rates of killings with “Martin attributes” in stand-your-ground and non-stand-your-ground jurisdictions. See JOHN K. ROMAN, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA (2013), available at <http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf>. The study revealed that, in general, whites who kill blacks are far more successful at having these killings deemed justified than other types of killers. *Id.* at 7. However, the existence of a stand-your-ground statute significantly increased acquittals of both white and black defendants who killed white victims, with little effect on cases where defendants had killed black victims. *Id.* at 7–9; see also Gruber, *Race to Incarcerate*, *supra* note 34, at 1010–11 (discussing this study).

55. See ROMAN, *supra* note 54.

56. In fact, police declined to arrest, not because of a stand-your-ground statute, but because they did not have evidence to contradict Zimmerman’s claim that he shot during an active attack. See *City of Sanford in over Its Head*, W. ORLANDO NEWS (Mar. 12, 2012), <http://westorlandonews.com/2012/03/12/city-of-sanford-in-over-its-head/>. The defense attorney argued not that Zimmerman had the right to stand his ground but that he was being attacked (specifically, slammed against the pavement) and that the suggestion that this pavement was not a weapon was “disgusting.” See Lizette Alvarez, *Zimmerman Case Goes to Jury, with Defense Urging It to Remove Emotion*, N.Y. TIMES (July 12, 2013), <http://www.nytimes.com/2013/07/13/us/zimmerman-trial.html>.

57. See Gruber, *Race to Incarcerate*, *supra* note 34, at 994–95.

conditions fully intact and allows state actors and jurors to continue to apply the self-defense doctrine in an unfair manner, just with more severe consequences to the defendants, likely minority defendants, who draw their punitive gaze.

A similar story plays out with the feminist position on the provocation defense. Provocation mitigates murder to manslaughter when a defendant has been adequately provoked into a state of passion.⁵⁸ Feminists critique the doctrine for giving cover to male intimate homicide defendants who assert that some benign behavior on the part of the female victim—wanting a divorce, leaving, dancing with another, et cetera—impassioned them to kill. Feminist scholars have publicized the horrific and spectacular facts of individual cases to demonstrate that gender justice requires the abolishing or generally narrowing of the defense.⁵⁹ Reformers believe that such changes will have the primary effect of ensuring that atrocious femicidaires receive the most severe sentences under U.S. law.⁶⁰ However, the only empirical study of provocation cases found that such men are generally unsuccessful at pleading provocation and those who are successful tend to be vulnerable people who killed their tormentors.⁶¹ Moreover, given the demographics of murder defendants generally, “the group most likely to be burdened by the elimination or limitation of the provocation defense is young men of color accused of non-intimate homicides and facing murder charges in one of the most punitive systems on earth.”⁶²

II. THE PUNITIVE IMPULSE AND ITS RESISTORS

Why do progressives, particularly feminists, upon diagnosing the problem of violence against minorities and women, often eschew all the global critiques of criminalization and endorse criminalization within the current penal structure as a solution of first resort? Why has the issue of individual violence become the primary target of feminist inquiry and reprobation and at least an important component of antiracist discourse? I have argued that a “punitive impulse” can lead even those who, as a philosophical matter, question state authority, and as a practical matter, critique the actual operation of the U.S. penal system, to ignore these

58. See Gruber, *supra* note 14, at pt. I.

59. See *id.* at pt. II; see, e.g., CAROLINE FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 170 (2000); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 201 (2005) (describing one case in which a man assaulted his fiancée doe dancing with another man).

60. See, e.g., JEREMY HORDER, PROVOCATION AND RESPONSIBILITY (1992); Nikolette Y. Clavel, Note, *Righting the Wrong and Seeing Red: Heat of Passion, the Model Penal Code, and Domestic Violence*, 46 NEW ENG. L. REV. 329, 339 (2012); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 667 (2001); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1342, 1389 (1997).

61. See generally Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCHOL. PUB. POL'Y & L. 102 (2004).

62. Gruber, *Minority*, *supra* note 34, at 185.

dispositions and embrace punitivity for whatever they consider true harm.⁶³ This process of jumping from identifying a harm to a prosecutorial solution often happens unconsciously or at least without serious deliberation. The punitive impulse results from a sustained national *eidōs* that has for decades accepted criminal law as a legitimate, if not the preferred, response to harms attributable to bad individuals:

The punitive impulse stems from a distinct punitive ideology that embraces a particular set of normative commitments, empirical assumptions, and a specific view of the role of government. For decades, criminal law and policy in the United States has conceived of criminal offenders as dangerous, abnormal actors, who are the unique cause of social disorder, retributively deserve harsh punishment, and need to be totally incapacitated in order to prevent recidivism and deter others from committing crime. The ideology of crime as a disease of inequality and social breakdown to be prevented through *ex-ante* social programs or addressed with *ex-post* treatment seems as *passé* as the zoot suits that were en vogue at the same time as the ideology. It is thus difficult to imagine a paradigm under which criminal punishment is a measure of last resort to be used exceedingly sparingly.⁶⁴

Although, progressives reject the tough-on-crime philosophy that created our American-style penalty, being on the left hardly makes a person immune from the long-standing and culturally embedded messages about perpetrators, victims, and punishment. As one scholar notes, even for the skeptical “it is difficult to shake the paradigm that the criminal law is the natural response to a social problem.”⁶⁵

The punitive impulse, in addition to inducing selective amnesia about the general progressive position on the penal state, also appears to lead some progressive scholars to embrace very formalist and absolutist positions that are generally anathema to critical theorists. When it comes to racialized and gendered violence, formal equality quickly trumps anti-subordination, as progressives call for equal prosecution in the otherwise denigrated criminal law. For example, race-conscious commentators asserted that Zimmerman should have received the same type of treatment that Martin would have received had he been the shooter.⁶⁶ In doing so, they seem to

63. See Gruber, *Race to Incarcerate*, *supra* note 34, at 966–67.

64. *Id.* at 1016.

65. Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1712 (2012).

66. See, e.g., John Darragh, *If Roles Were Reversed in the Zimmerman Case*, CHI. TRIBUNE (July 17, 2013), http://articles.chicagotribune.com/2013-07-17/opinion/chi-20130717-darragh_briefs_1_george-zimmerman-zimmerman-case-trayvon-martin; Laurence Lewis, *If Trayvon Martin Had Been White, and George Zimmerman Were Black*, DAILY KOS (Apr. 1, 2012), <http://www.dailykos.com/story/2012/04/01/1078914/-If-Trayvon-Martin-had-been-white-and-George-Zimmerman-were-black#>; Annie-Rose Strasser, *With Racial Roles Reversed, Three Self-Defense Cases That Went the Other Way*, THINKPROGRESS.ORG (July 15, 2013), <http://thinkprogress.org/politics/2013/07/15/2297541/self-defense-zimmerman/>; see also Mike Schneider & Curt Anderson, *Trayvon Martin Case: At Sanford Town Hall, Residents and Civil Rights Leaders Push for Shooter's Arrest*, HUFFINGTON POST (Mar. 21, 2012), http://www.huffingtonpost.com/2012/03/21/town-hall-sanford-trayvon-martin_n_1369060.html (reporting the statement of Martin's attorney, Benjamin Crump).

ignore that if Martin had wrested the gun and shot Zimmerman, progressives would want police restraint, prosecutorial caution, and a robust self-defense law. Feminists also take up the mantle of equality, even though they cannot credibly argue that male offenders receive greater leniency than similarly situated female defendants. The American criminal system is notoriously biased toward white women offenders who frequently receive lower sentences than their male counterparts—a bias that does not seem to offend most feminists' senses of formal equality.⁶⁷ Instead, feminists argue that gender crime should be treated “like any other crime.”⁶⁸ Yet, reformers have advocated for and achieved a domestic violence system that institutes exceptional procedural rules, treats gender violence as *sui generis*, and expresses special zero-tolerance, all in the name of equal treatment.⁶⁹

Progressive advocates of criminalization also justify punitive change on the formalist grounds of retributivism and expressivism.⁷⁰ They assert that racist killers and femicidaires in some objective sense “deserve” the highest charge (first-degree murder) and attendant punishment (life without parole or death) available under U.S. criminal law and that only such charges and punishments express appropriate condemnation.⁷¹ However, retributivism necessarily justifies state infliction of pain solely with reference to a priori decontextualized conceptions of culpability. Feminist and other critical theorizing long has held that acontextual and “objective” legal principles like retributivism reflect, obscure, and entrench social, economic, and racial hierarchies.⁷² To be sure, progressive scholars critique retributivism for

67. See Farrell et al., *supra* note 39, at 85–86 (“[L]eniency toward women has become an almost accepted phenomenon among scholars studying criminal case processing.”); Laurie L. Ragatz & Brenda Russell, *Sex, Sexual Orientation, and Sexism: What Influence Do These Factors Have on Verdicts in a Crime-of-Passion Case?*, 150 J. SOC. PSYCHOL. 341, 341–60 (2010) (conducting a study involving mock-passion killings and finding that “heterosexual female defendants were less guilty and received the shortest sentences” and “[b]enevolent sexism contributed significantly to guilt perceptions”).

68. See Gruber, *supra* note 44, at 817.

69. See *id.* at 769 (discussing specialized rules). For a more substantial critique of the role of formal equality in feminist criminal law theorizing, see Gruber, *supra* note 14, at pt. IV.

70. The retributive theory of punishment is derived from Kantian metaphysics and dictates that the state should punish those who deserve it as much as they deserve it. Expressivism is a theory attributed to philosopher Joel Feinberg’s book, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1974), and it dictates that law should express appropriate condemnation for wrongs. See generally Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 444–502 (2004) (discussing penal theory).

71. See Gruber, *supra* note 14 (analyzing feminists’ retributive and expressive justifications of criminal laws directed against gender violence); see also Eugene Robinson, *Repeal the ‘Stand Your Ground’ Law*, WASH. POST (Mar. 26, 2012), http://www.washingtonpost.com/opinions/repeal-the-stand-your-ground-law/2012/03/26/gIQAptsvcS_story.html (calling stand-your-ground laws “a license to kill”).

72. See *supra* notes 1–3; see also Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 203, 205 (2005); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 11–12 (2010).

reifying race and social marginality as culpability⁷³ and have traced how retributive rhetoric undergirded late twentieth century tough-on-crime ideology and the consequent incarceration explosion.⁷⁴ Social scientists also have discovered that people's conception of culpability is inherently raced.⁷⁵ Theorists also critique the notion that punishment is justified because it "expresses" anticrime messages. Bernard Harcourt, for example, points out: "Punishment usually also communicates, importantly, political, cultural, racial and ideological messages. The meaning of punishment is not so coherent or simple. Many contemporary policing and punitive practices, for instance, communicate a racial and political, rather than moral, message—a message about who is in control and about who gets controlled."⁷⁶

The punitive impulse, in addition to explaining why progressives prioritize criminal responses to harm, helps illuminate the choice to focus on individual acts of violence against minorities rather than more global sources of harm. Today, leftist critical race and environmental scholars discuss the concepts of "slow violence" and the "slow death" of marginalized populations caused by conditions of poverty, environmental degradation, public and private violence, and low social status.⁷⁷ These critiques, however, are all but absent from popular discussion and do not appeal to a public conditioned to understand questions of justice and equity through the lens of spectacular instances of individual wrongdoing. As a strategic matter, condemning what deviant hate-crime killers or abusive men do secures public and political support. For this reason, feminist efforts to end sex trafficking, severely punish rape, and express zero-tolerance for domestic violence have resulted in some strange bedfellows like legal risk management teams, the Christian right, and John Ashcroft.⁷⁸ However, "strategies become institutions," and feminists' tactical choices within the neoliberal criminal state are now simply part of feminism.⁷⁹

73. See, e.g., Jeffrie Murphy, *Three Mistakes About Retributivism*, 31 ANALYSIS 166 (1971); Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 747–48 (2009).

74. See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 255–56.

75. See Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1950, 1950–51 (2014).

76. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

77. See, e.g., ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* 2 (2011); Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 777 (2006).

78. See Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT'L & COMP. L. 269, 269–73 (2006); Gruber, *supra* note 44, at 794 n.226 (discussing domestic violence and John Ashcroft).

79. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 605 (1990) (quoting Cynthia Ozick, *Literature and the Politics of Sex: A Dissent*, in ART & ARDOR 287 (1983)).

The relentless focus on individualist harm, embrace of punitive policies, sublimation of racial and other general critiques of the penal state, and use of formalist constructs demonstrate that progressive criminal law scholarship is subject to the ideological capture that has influenced a vast amount of criminal law theorizing over the past several decades. Nevertheless, there are areas of progressive criminal law scholarship that seem to resist the punitive impulse to remedy discriminatory leniency with greater carceral severity. Indeed, many feminist and racial scholars dissent from their colleagues' view that the best way to address bias crimes, rape, domestic violence, and the like is through expansion of the criminal system.⁸⁰ Here, however, I am talking about discrete areas where progressive scholars somewhat agree that the identification of horrific crimes against minorities and even discovery of disparate leniency toward those who offend against minorities does not necessitate a punitive response.

One of the most common examples of racism in criminal law involves the administration of capital punishment. Death penalty scholars publicize evidence that those who offend against black victims are less prone to receive capital punishment than those who offend against white victims, especially African Americans who offend against white victims.⁸¹ But critical commentators do not then call for measures to ensure that those who kill blacks receive the death penalty in equal proportion to those who kill whites.⁸² Racial capital punishment critics do not publicize the horrific details of murders involving black victims and then assert that the killers retributively deserve death.⁸³ Rather, progressives have always characterized the victim-based racial bias in death penalty as grounds for further skepticism of the government's ability to manage the immense penal power of the death penalty. Thus the fact that the capital punishment

80. See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 851–52 (2001); Miccio, *supra* note 38, at 281–82.

81. See Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2145 (2011) (conducting a twenty-eight year study and concluding that victim race “is a strong predictor of who is sentenced to death in North Carolina”); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990) (synthesizing twenty-eight death penalty studies and concluding that “[t]he race of victim influence was found at all stages of the criminal justice system process” but “evidence for the influence of the race of defendant on death penalty outcomes was equivocal”); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 105 (1984) (conducting a study of eight states' capital systems and finding that race-of-victim discrimination “is a remarkably stable and consistent phenomenon”).

82. See Gruber, *Minority*, *supra* note 34, at 163.

83. If anything, they publicize cases in which innocent black men are possibly subjected to outrageous official conduct in capital cases. See, e.g., Stephen B. Bright, *The Death Penalty and the Society We Want*, 6 PIERCE L. REV. 369, 378 (2008); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2649–59 (1998) (book review).

system is lenient toward crimes against minorities is not grounds to make it more severe; rather, it is grounds to abolish it.⁸⁴

In this case, progressive scholars are able to resist the punitive impulse, even when faced with brutally violent crimes against minorities, because they take an institutional and distributional view of pro-prosecution reform within the context of the current U.S. penal state. Progressive scholars “look at capital punishment institutionally—its philosophical groundings, its larger effects on subordinated groups and communities, and its place within an evolved global civilization.”⁸⁵ When seen in an institutional light, the racial disparity is just one more reason to question the entire practice. At least one race-conscious theorist, Randall Kennedy, has suggested that the racial disparity could be remedied through applying capital punishment more frequently to those who murder African Americans, recognizing an attendant cost of increasing death sentences for black defendants.⁸⁶ In response, progressive scholars have been fairly united in the view that Kennedy’s position does not adequately account for the other racial, philosophical, and practical drawbacks of expanding capital punishment administration.⁸⁷

In a somewhat similar vein, queer theorists do not universally view crimes against LGBT persons, even those motivated by bias, to be grounds to reform criminal law and procedure to give more advantages to prosecutors. While fully condemning bias crimes and “gay panic,” such scholars remain circumspect about the ability of criminal law to serve as a vehicle of gender liberation. Dean Spade articulates the position:

Increasingly, queer and trans people are asked to measure our citizenship status on whether hate crime legislation that includes sexual orientation and gender identity exists in the jurisdictions in which we live. . . . The idea that we are in danger rings true, and the message that law enforcement will deliver safety is appealing in the face of fear. The problem is that these promises are false, and are grounded in some key myths and lies about violence and criminal punishment.⁸⁸

Spade further notes, “Many queer and trans people are increasingly critical of criminalization and immigration enforcement, and are unsatisfied by the

84. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder ‘for whites only’) and no death penalty at all, the choice mandated by the Constitution would be plain.” (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982))).

85. Gruber, *Minority*, *supra* note 34, at 134–35; see also Harry Blackmun, *The Supreme Court and the Law of Nations*, 104 *YALE L.J.* 39, 45–46 (1994); Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 *N.Y.U. L. REV.* 1283, 1284 (2006).

86. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *HARV. L. REV.* 1388, 1392–94, 1438 (1988).

87. See Gruber, *Minority*, *supra* note 34, at 169; see also, e.g., David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy’s “Politics of Distinction,”* 83 *GEO. L.J.* 2547 (1995).

88. Spade, *supra* note 12, at 3.

idea that the answer to the violence we experience is harsher criminal laws or more police.”⁸⁹

Death penalty scholars and queer theorists are certainly not intimating that crimes against racial and gender minorities are not a problem or just a negligible problem. They do not even take the position that amplified criminal law never produces improved outcomes. Rather, they critically examine the larger distributional effects and institutional meanings of punitive reform and conclude that the benefits of punishing some sexist, racist, and homophobic offenders is outweighed by the risk that the criminalization will actually affect marginalized people, the costs of legitimating late modern American penal philosophy, and the diversion of academic capital away from economic and cultural efforts.⁹⁰ These types of analyses, I assert, are necessary to counter the very deeply entrenched punitive impulse that leads people, upon viewing harm that moves them, to advocate criminalization *for its own sake*.

III. DISTRIBUTIONAL ANALYSIS AND THE PROMISES AND PERILS OF DATA

Having made the case that a deeply entrenched punitive impulse exists and is manifest in progressive scholarship, this part seeks to refine a methodology for resisting it. Accordingly, it describes distributional analysis, explains how empirical work fits into the methodology, and advances a cautionary note about the limits of scientific objectivity and empirical knowledge. As indicated in the introduction, distributional analysis is not a novel concept, and critical theorists have been employing it for decades.⁹¹ Critical legal theorists sometimes describe the enterprise as looking beyond legal rhetoric and formalism to identify the “winners and losers” of a given legal regime.⁹² Law and economics adherents might call it cost-benefit or efficiency analysis, although most legal economists’ very limited concept of what counts as a benefit or cost, which ignores social costs and wealth relativity, make their analyses more obfuscating than enlightening in terms of identifying actual interests.⁹³

The most current and deliberate description of distributional methodology comes from recent literature on governance feminism.⁹⁴ Left legal scholars coined the phrase governance feminism to describe the phenomenon of feminism’s powerful influence on various governance structures—local and national governments, bureaucracies, intrastate

89. *Id.* at 7–8.

90. *See supra* notes 75–80 and accompanying text.

91. *See supra* note 13 and accompanying text.

92. *See* Esquirol, *supra* note 13, at 162.

93. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 118–21 (1987) (discussing the ideology of law and economics).

94. *See* Halley, *supra* note 13 (manuscript at 61–71); *see also* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 405–06 (2006). For an example of excellent scholarship that employs distributional analysis, *see* Prabha Kotiswaran, *Born unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579 (2008).

organizations, legal systems, social norms, etc. The scholarship illustrates and critically examines how feminists have come to “walk the halls of power” and govern.⁹⁵ Let me stop there, as this is not an essay about governance feminism.⁹⁶ The governance feminism literature’s framework for distributional analysis is helpful in understanding the methodological proposal here. Janet Halley, a seminal voice in this literature, describes distributional methodology as follows:

You can do a distributional analysis in your mind while walking towards an important meeting or with allies via a highly abbreviated email huddle; you can make it the form and substance of a long book. Basically, you are trying to identify the consequences of a change you could introduce in the status quo, and to decide whether they are “worth it.”⁹⁷

In Halley’s description, distributional analysis has three primary directives: (1) separate “is” from “ought,” (2) identify the surplus, and (3) imagine it otherwise.⁹⁸ Discussing these directives in turn, the first idea is that those who seek to intervene in a legal regime should, at the outset, attempt to gain a full, fair, and deep understanding of what is going on before passing on the morality of the legal regime. This reflects the legal realist insight that any credible analysis of the law requires one to look beyond what a law says or aspires to do and understand what the law actually does.⁹⁹ It also incorporates the notion that scholars should not approach legal analysis from a morally retrospective position. Drawing on Llewelyn, Halley asserts that theorists should not first decide on some utopian vision of a legal order and, in this frame of mind, decide whether the existing arrangement is desirable.¹⁰⁰ This stands in stark distinction to the prevailing method of justifying criminal law intervention—through penal theory. Many proponents of retributivism believe that the penal theorists’ sole purpose is to identify wrongs in some abstract, perhaps arbitrary or political, sense and prescribe punishment, regardless of the political, social, and legal environment in which the punishment takes place or even the nature of the punishment itself.¹⁰¹ Similarly, expressivists

95. Halley, *supra* note 13 (manuscript at 3).

96. In fact much of this Article is subject to Halley’s critique of fetishizing state authority. *See id.* (manuscript at 5–7).

97. *Id.* (manuscript at 61).

98. *Id.*

99. *See id.* (manuscript at 62) (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897)); *see also* Esquirol, *supra* note 13, at 161 (discussing influence of legal realism on distributional analysis).

100. *See* Halley, *supra* note 13 (manuscript at 62) (citing Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931)).

101. *See* Gruber, *supra* note 70, at 452–55 (noting retributivism’s arbitrariness). After reading some of my scholarship on provocation law, which endorses distributional analysis, a very famous retributive theorist remarked during a public panel that he found the work “utterly foreign and frightening.”

identify one possible meaning of a law—that it does or does not appropriately condemn crime—and that is the end of the critical inquiry.¹⁰²

Much of the current progressive criminal law scholarship also takes a morally retrospective position and assumes that reform proposals will somehow avoid the realities of criminal law administration and take place in a utopian world. A striking example of this is feminists' proposals to abolish the provocation defense. Reformers recognize the potential that removing mitigation from the law would likely result in more first-degree murder convictions and therefore more life without parole and death sentences—sentences feminists generally disfavor.¹⁰³ Upon recognition of this wrinkle, some have retreated from the anti-provocation position, at least in death penalty jurisdictions.¹⁰⁴ Other reformers, however, continue to support provocation abolition/limitation proposals and claim that larger sentencing consequences are simply “a different issue.”¹⁰⁵ Instead of comparing the status quo with what is actually possible, provocation critics measure current provocation law against a reformed murder law that exists in a hypothetical legal system with a radically less punitive sentencing structure. Similarly, in the Zimmerman case, those critiquing stand-your-ground appear to assume that the alternative to the status quo consists of a world in which the newly expanded murder law will be applied by fair-minded antiracist state officials and not result in greater application of the death penalty.¹⁰⁶

The “is-ought” distinction then naturally flows to the next directive of distributional analysis—identifying the surplus. Identifying only instances of suffering in the status quo gives a very limited and perhaps deceptive view of what is going on. It also has a very right-leaning political bent. The selective exploitation of spectacular instances of brutality has been a deliberate and important part of the conservative strategy to push through pro-penal, antiwelfare reform.¹⁰⁷ Instead, critical criminal law scholars also should investigate the benefits of the status quo, even to those generally identified as crime victims. For example, some progressive scholars are breaking from the feminist tradition of cataloging and counting women's

102. Feinberg, the originator of expressivism, however, seemed to believe that communication was but one of the many functions of criminal law. FEINBERG, *supra* note 70, at 98.

103. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 366–67 (1996) (calling this the deepest and most interesting challenge to their theory); see also V.F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 364 n.11 (2004) (book review).

104. See, e.g., Nourse, *supra* note 103, at 364 n.11; see also Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 90 (2010).

105. This is a frequent response to my critique of provocation abolition proposals. See also Kahan & Nussbaum, *supra* note 103, at 368.

106. But the evidence is that self-defense law, without stand-your-ground, is applied in an incredibly discriminatory manner. See *supra* note 54 and accompanying text.

107. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 841 (2001); Gruber, *supra* note 12, at 639; *supra* notes 30–31 and accompanying text.

experiences of violence and instead are asking women who experience violence to explain the things they value, the things they need, the obstacles they face, et cetera.¹⁰⁸ Of course, it is an impossible task to examine all of the benefits and harms to all of the players in a given criminal law controversy, much less than determine what counts as a harm and a benefit in a world where the same act can be a harm or benefit, depending on the context or who you ask. Nevertheless, criminal scholarship often proceeds as if it has fully interrogated the justice of the status quo legal arrangement, when in fact it has set out to describe and publicize a pre-determined harm. Halley explains, “Getting the frame right enough is part of the challenge. One thing that does not make sense, ever, is to frame in only the losers. Who are they losing to? What are they losing? Why were they in the game in the first place?”¹⁰⁹

These two components of distributional analysis speak directly to the question posed in this symposium: How does one meld critical theory and empirics? It should be evident that finding out what is going on and identifying winners and losers calls for empirical study of the world, not just scholarly exegesis of the law.¹¹⁰ However, empirical study set within a methodology that confuses “ought” with “is” or only focuses on harm, undermines rather than furthers the critical mission. Progressive and feminist criminal law commentators often set out to prove that a certain spectacular harm, likely publicized by the media, is serious and widespread—“an epidemic”—as a precursor to suggesting criminalization.¹¹¹ Experts then design studies, gather evidence, and interpret information within this framework. Scientific studies, unlike anecdotal illustration or argument, come with an added danger—they bear

108. See, e.g., ELEANOR LYON ET AL., MEETING SURVIVORS’ NEEDS THROUGH NON-RESIDENTIAL DOMESTIC VIOLENCE SERVICES AND SUPPORTS: RESULTS OF A MULTI-STATE STUDY, NATIONAL INSTITUTE OF JUSTICE REPORT (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237328.pdf>; see also LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 112–14 (2008); Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 580 (2010).

109. See Halley, *supra* note 13 (manuscript at 63).

110. See, e.g., *supra* notes 43–44 and accompanying text.

111. See Gruber, *supra* note 14 (discussing this phenomenon in the context of provocation law); see also, e.g., Cheryl Nelson Butler, *Kids for Sale: Does America Recognize Its Own Sexually Exploited Minors As Victims of Human Trafficking?*, 44 SETON HALL L. REV. 833, 834 (2014) (discussing the human trafficking epidemic); Carolyne R. Dilgard, *Crossing the Line: The Interstate Implications of Issuing and Enforcing Domestic Violence Protection Orders: An Examination of New Jersey*, 35 RUTGERS L.J. 253, 255 (2003) (discussing the domestic violence epidemic); Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL’Y 247 (1997) (discussing the campus rape epidemic); Jenna Grassbaugh, *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution?*, 11 OHIO ST. J. CRIM. L. 319 (2014) (discussing the military sexual assault epidemic); Laura Meli, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, 2014 U. ILL. L. REV. 921, 925, 930–31 (discussing the hate crime epidemic).

the imprimatur of objectivity.¹¹² Thus, while scholars and laypersons alike can write off theory and postulation as merely contingent arbitrary opinion, data is the “objective truth,” when in fact it is often ideology masquerading as objectivity.

An example of this phenomenon is the proliferation of campus climate surveys of sex, designed in the wake of a publicized rape “crisis” and “epidemic” and a vocal critique that existing studies undercount rape and discourage reporting.¹¹³ The federal government has advised universities to model climate surveys on the 2007 National Institute of Justice Campus Sexual Assault Study¹¹⁴ (CSA) and asserts that surveys should not simply ask whether the respondent has been raped. The claim is that this methodology will inexorably understate the sexual assault problem because people do not like the rape label and have differing definitions of rape.¹¹⁵ However, the government does not instead endorse asking the respondent what actually happened during the sexual encounter—how many drinks, what was said or done, where it took place, how did you feel, et cetera—and letting that information speak for itself. Instead, the directive is that surveys query whether the person has had “unwanted” sexual contact “that involved force or threats of force” or that occurred “while you were unable to provide consent or stop what was happening.”¹¹⁶ It further defines force to include “someone holding you down with his or her body weight [or] pinning your arms” and specifies that inability to consent or resist could include “times that you voluntarily consumed alcohol or drugs.”¹¹⁷ Thus, a person who felt subtle pressure, was fairly unenthusiastic, and was on the bottom during sex, but did not communicate unwillingness, could answer “yes” to the forcible sexual assault question. Likewise, a person who engaged in ambivalent or later-regretted sex while voluntarily intoxicated could answer “yes” to the incapacitated sexual assault question.

The CSA and government directive, in an apparent effort to prevent undercounting, create a “collapsed continuum” in which a unenthusiastic sex in the missionary position is in the same category as rape at gunpoint.¹¹⁸ It also puts drunken unsatisfying sex in the same category as being raped during rufie-induced unconsciousness. This broad counting methodology

112. See *infra* note 122 and accompanying text.

113. The call for college climate studies comes from the very top, the White House. It released a document stating that new climate surveys are necessary because “official statistics underrepresent the extent of the problem on any one campus” and setting forth methods for ensuring that surveys do not “underreport” rape. CLIMATE SURVEYS: USEFUL TOOLS TO HELP COLLEGES AND UNIVERSITIES IN THEIR EFFORTS TO REDUCE AND PREVENT SEXUAL ASSAULT, NOTALONE.GOV [hereinafter CLIMATE SURVEYS], available at <https://www.notalone.gov/assets/ovw-climate-survey.pdf>.

114. CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (2007) [hereinafter CSA], available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

115. CLIMATE SURVEYS, *supra* note 113, at 16.

116. *Id.* at 24.

117. *Id.*

118. See JANET HALLEY, SPLIT DECISIONS 163 (1996) (discussing concept of the “collapsed continuum”).

(and perhaps not “false consciousness”) goes far in explaining the fact that, in the CSA, the most frequent answer to the question of why students fail to report “rape” is I “did not think it was serious enough to report.”¹¹⁹ Nevertheless, pursuant to the counting methodology, the media headlines and White House talking points blare that “one in five female college students are raped.”¹²⁰ This statistical “indicator” is then the beginning and the end of the conversation on whether greater punitivity is warranted.¹²¹ Sally Engle Merry theorizes the pattern:

As forms of knowledge, indicators rely on the magic of numbers and the appearance of certainty and objectivity that they convey. A key dimension of the power of indicators is their capacity to convert complicated contextually variable phenomena into unambiguous, clear, and impersonal measures. They represent a technology of producing readily accessible and standardized forms of knowledge. . . . Labeling is essential to produce a measure that is readily understood by the public and simple in its conception. Labels do not necessarily accurately reflect the data that produce the indicators, however. How indicators are named and who decides what they represent are fundamental to the way an indicator produces knowledge.¹²²

When it comes to indicators and labeling that involve criminal harm—harm that can be attributed to individuals’ behavior—the power of data combined with the punitive impulse necessarily lead people to embrace criminalization reforms. Aziza Ahmed observes:

[T]he production of a vast amount of knowledge on violence against women [(“VAW”)]; on sexual violence, sex trafficking, gender crimes, and domestic violence amongst others. . . . crystallizes a new commonsense about the way to approach women’s rights: through criminal law and even through war. The heavily contested feminist terrain of how to actually address VAW gives way to one strand of feminism coded in expert and data driven knowledge about VAW and justifies the punitive response.¹²³

It is evident that empirical analysis has a very large role to play in distributive methodology’s call on progressive scholars to scrupulously map out the terrain of interests in any given legal controversy. A critical

119. *Id.*

120. CSA, *supra* note 114, at 5–24.

121. See *1 Is 2 Many*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/1is2many> (last visited Apr. 23, 2015); see also Juliet Eilperin, *Seeking to End Rape on Campus, White House Launches ‘It’s On Us,’* WASH. POST, (Sept. 19, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/09/19/seeking-to-end-rape-on-campus-wh-launches-its-on-us/>; Eliza Gray, *The Sexual Assault Crisis on American Campuses*, TIME (May 15, 2014), <http://time.com/100542/the-sexual-assault-crisis-on-american-campuses/>; Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NPR (Feb. 24, 2010), <http://www.npr.org/templates/story/story.php?storyId=124001493>.

122. Merry, *supra* note 19, at S84; see also Jasanoff, *supra* note 19 (discussing the diverse techniques of deploying scientific objectivity in the context of state policy making, empowerment, and regulation).

123. Aziza Ahmed, *Women Who Punish: Feminist Technocracy and Violence Against Women* (Northeastern Univ. Sch. of Law, Working Paper, 2014) (on file with author).

empiricist, however, must be careful to attempt to avoid the pitfalls described by Halley, Merry, and Ahmed. Moreover, empiricists should bear in mind that the indicators and labels they produce transform the very environment on which they comment. In the criminal law context, the publicizing of outrageous harms has the potential to create a cultural need for retribution and a widespread feeling of insecurity. Thus, if criminalization does not occur, people suffer because these needs and feelings go unaddressed.

In the Zimmerman case, the broad dissemination of the claim (and empirical “support”) that stand-your-ground provides a virtual license to “shoot-away” and is primarily utilized by racist whites to shoot blacks, significantly changed the equities of retaining the provision.¹²⁴ First, the cultural meaning of stand-your-ground began to eclipse the legal meaning, making the law more permissive than it otherwise would have been.¹²⁵ Second, it produced a feeling in many African Americans that the doctrine’s continued existence signified their definitive subordination.¹²⁶ Thus, before the Zimmerman case, the analysis might have involved determining whether, on balance, minorities (aggregating defendants and victims) benefit or suffer from stand-your-ground, and arguing for retention if minorities generally benefit. Today, the analysis is different, such that even if minorities technically gain advantage under the doctrine, any such benefit has to be weighed against the cost of retaining a symbol of racism.

A similar scenario plays out with campus sexual assault, where university officials now educate freshmen that rape is likely, that anyone can commit it, and that it can happen anywhere.¹²⁷ Strikingly, when asked what she learned during freshman (White House-approved) sexual assault orientation, one student replied, “[i]t’s infuriating because no one is safe.”¹²⁸ And, despite the fact that the *Rolling Stone* article reporting a fraternity gang-rape at University of Virginia rapidly unraveled, a female freshman nonetheless reported that “[w]e’re scared to go out now, even in groups.”¹²⁹ Accordingly, female students feel that punitive campus

124. See, e.g., John Nichols, *Outrage Is Rising Against Stand Your Ground*, NATION (July 16, 2013, 10:01 PM), <http://www.thenation.com/blog/175312/outrage-rising-florida-and-nationally-against-stand-your-ground> (Mayor Bloomberg referring to stand-your-ground laws as “shoot first” laws); *Repeal Florida’s Reckless “Shoot First” Law That Shields Trayvon’s Killer*, CHANGE, <http://www.change.org/petitions/repeal-florida-s-reckless-shoot-first-law-that-shields-trayvon-s-killer> (last visited Apr. 23, 2015).

125. See Gruber, *Race to Incarcerate*, *supra* note 34, at 977 n.88 (noting that Zimmerman juror B-37 apparently believed that stand-your-ground just generally made it easier to plead self-defense).

126. See *supra* note 35 and accompanying text.

127. See *supra* note 121; see also Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, NPR (Aug. 12, 2014), <http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention>.

128. Smith, *supra* note 127.

129. Laura Bassett & Tyler Kingkade, *Rolling Stone’s UVA Gang Rape Story Begins to Unravel*, HUFFINGTON POST (Dec. 5, 2014), http://www.huffingtonpost.com/2014/12/05/rolling-stone-rape_n_6277308.html?utm_hp_ref=breakingthesilence.

disciplinary reform is necessary to protect them and value women.¹³⁰ Distributive analysis of whether to ratchet-up discipline now must factor into the potential for aggravating or allaying college women's (perhaps false) sense of insecurity.¹³¹ Consequently, when engaging in critical empirical analysis, scholars must keep in mind that their work does not only reflect existing distributions, it has the power to produce new distributions, new cultures, and new meanings. As Justice Jackson said about legal decisions, empirical observations also can lie about like loaded weapons.¹³² Recognizing the epistemological power of this information can aid the critical empiricist in determining what to study, how to study it, and how and whether to release results. If the scholar believes that releasing the information will, within the current political, social, and cultural milieu, inevitably or likely lead to the adoption of policies with maldistributive effects, the scholar has the option of holding the information, publicizing but a part of it, or trying to counter such an effect through careful labeling.

This brings us to the third component of distributive analysis: imagining it otherwise. Once a critical scholar feels that she has mapped out the various interests in a legal regime in a satisfactory matter, she then can bring in normative judgments regarding what is wrong and right about the distribution and how legal intervention might tick the advantages and disadvantages in one way or another.¹³³ Unlike a utilitarian who might see all interests as morally equal, feminists and race scholars' analyses rightly evidence particular normative commitments, such as anti-subordination, distributive justice, and substantive equality.¹³⁴ Thus, for the critic, the interests of majority actors, men and whites, in maintaining a monopoly on social status and economic power are not coextensive with minorities' interests in freedom from subordination and substantive justice.¹³⁵ Accordingly, a progressive scholar can perform distributive analysis while maintaining a commitment to women's and minority empowerment.¹³⁶ However, determining what is good for women, good for African Americans, et cetera, is a very complicated endeavor. Instead of working in

130. See generally Lulu Chang, *Open Letter by Harvard Student on Rape Raises Questions About Sexual Assault on Campus*, BUSTLE (Apr. 2, 2014), <http://www.bustle.com/articles/19834-open-letter-by-harvard-student-on-rape-raises-questions-about-sexual-assault-on-campus>; Caitlin Flanagan, *The Dark Power of Fraternities*, ATLANTIC (Mar. 2014), <http://www.theatlantic.com/features/archive/2014/02/the-dark-power-of-fraternities/357580/>; Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAGAZINE (Sept. 21, 2014), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html>.

131. See *supra* notes 118–21, 128–29 and accompanying text.

132. See *Korematsu v. United States*, 323 U.S. 214, 246 (1944).

133. Halley, *supra* note 13 (manuscript at 67–68).

134. See DELGADO & STEFANCIC, *supra* note 1; Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1184 (1994) (noting feminism's "commitment to a more egalitarian distributive structure and a greater sense of collective responsibility").

135. The moral priorities of these critical programs are directly in opposition to the law and economics priorities. See also *supra* note 93.

136. See generally Gruber, *supra* note 5 (characterizing a body of work that emphasizes women's empowerment but breaks from the "orthodoxies" of second-wave feminism).

the mainstream feminist mode and assuming that every tick against male power is a tick in favor of female empowerment, distributional analysis forces us to see how the ticks actually work and confront the fact that “[s]ome women are the mothers, daughters, or sisters of men facing retributive justice, even as some women are the victims of male violence; some women are the victims of other women’s violence.”¹³⁷

When assessing whether a given change in the status quo is good from a feminist or critical race perspective, distributive methodology calls for the examination, not just of the ways in which the interests of men and women or whites and blacks conflict, but also the complex ways in which they converge. Thus, for example, a battered woman’s interests in being free from violence conflicts with an abuser’s interests in continued battering. Nevertheless, the parties might have convergent interests in shelter and economic security as members of a socioeconomically marginalized group. They may have convergent interests in freedom from police overreach, as racial minorities. They may have convergent interests in stemming the tide of anti-immigrant fervor, as immigrants. They may have convergent interests in maintaining the relationship.¹³⁸ Yet domestic violence law, in an attempt to provide men with disincentives to commit violence, makes it easier to deny Section 8 housing, augments police arrest authority, adds grounds for deportation, and imposes de facto divorce.¹³⁹ This may be a tick in favor of the woman in an area of conflict—or not, if the punitive model actually leads to greater violence—but it is certainly a tick against her in several areas of convergence.

Finally, scholars should ground their analyses in the recognition that these seemingly individual conflicts and convergences take place within a larger structural reality. There is a structural reality as to why abusers batter and victims stay in the relationship. There is a structural reality as to why police deploy to certain neighborhoods, why they profile, and why they resist top-down reform.¹⁴⁰ There is a structural reality as to why undergraduates flock to parties at a certain fraternity house, even knowing that everyone calls it the “rapey frat.”¹⁴¹ Changes to the legal status quo not only affect individual distributions, they also reinforce or undermine structures. For criminal law theorists, any criminalization proposal necessarily occurs in the shadow of a particularly problematic time in the history of the American penitentiary. Consequently, proposals that treat criminal law as the natural remedy to social problems, even those in the

137. Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 *NEW ENG. L. REV.* 967, 972 (1998).

138. See Gruber, *supra* note 44, at 784 n.191; *supra* notes 40–41 and accompanying text.

139. See Gruber, *supra* note 44, at 784; Jeannie Suk, *Criminal Law Comes Home*, 116 *YALE L.J.* 2, 42–65 (2006) (discussing de facto divorce).

140. See Wesley G. Skogan, *Why Reforms Fail*, 18 *POLICING & SOC’Y* 23, 23 (2008).

141. Cf. Katherine Faulders, *UVA Sorority Members Outraged over Frat Party Ban*, ABC NEWS (Jan. 29, 2015), <http://abcnews.go.com/US/uva-sorority-members-outraged-frat-party-ban/story?id=28572703>. During a class on campus rape, law students informed me of the existence of an undergraduate fraternity that throws popular parties despite the fact that students colloquially refer to it as the “rapey frat.”

name of anti-subordination, risk reinforcing an anti-distributive, highly subordinating neoliberal political structure, not to mention legitimizing the carceral state.¹⁴² Again, this does not mean that a criminal law proposal can never be the path toward gender and racial liberation. Nevertheless, the realization that criminal law has built-in distributional costs will likely mean that, in the vast majority of scenarios, criminalization becomes a technique of last, not first, resort.

CONCLUSION

The methodology proposed here is certainly more cumbersome and perhaps less psychically rewarding than beating the drum about extreme injustice and pushing forward extensive criminal law reform. As lawyers, scholars, and people deeply committed to social justice, it is only natural that we want to expose subordination and oppression and seek its quick resolution. However, the left's forty-year flirtation with carceral feminism¹⁴³ demonstrates that progressives need to do more than just expose individual crimes against minorities and women and call for criminal law responses. Of course, some now grumble that the feminist movement is afflicted by "paralysis produced by the many internal critiques of feminism."¹⁴⁴ However, at this moment in which mass incarceration is a juggernaut, the criminal law books are filled to capacity, and newly publicized forms of harm herald rapid criminal lawmaking, perhaps a little paralysis on criminalization is not such a terrible thing.

Distributional analysis is not a perfect analytic construct with no downsides and no transactional costs—not that any method is. Critical race theorists may rightly worry that distributional analysis's complex and normatively ambivalent mapping of interests might undercut the ability of critical scholarship to actually produce a better distribution. To be sure, there is an emperor-has-no-clothes quality to the method. Jorge Esquirol explains:

It may be that systematically making societal decisions based on a perception of winners and losers . . . could have negative consequences for the very positions progressives favor. Indeed, this realist/critical move may undermine the very legal constructs that could most directly advance progressive interests (whatever those may be on a given point). This is the case because this analytic contributes to undermining the at-least

142. See Gruber, *Minority*, *supra* note 34, at 170–86.

143. See Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 143 (2007) (coining "carceral feminism"); Gruber, *Race to Incarcerate*, *supra* note 34, at 1003–14 (discussing history and origin of domestic violence criminal law reform); Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 467 (2005) (noting that the rape reform movement of the past several decades has strengthened the criminal response to rape).

144. Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After": Reading and Rereading the Sexual Subject*, 49 MCGILL L.J. 847, 854 (2004).

marginal confidence that is needed for law to operate as a viable social system.¹⁴⁵

What happens to a critical race theory that involves counting (and recognizing the value of) the interests of poor whites or working-class cops—groups that are often extremely racist? Can scholarship have political heft without moral indignation, without asserting rights, without identifying perpetrators and victims? My answer here is twofold. First, I believe that progressive scholarship generally will benefit from shattering liberal dogma, digging deeper, and being open to critique, both external and internal. And, lest we forget, “from a purely distributional perspective, some or all of law may be seen as pernicious, as it locks in certain earlier choices under the guise of ‘legal rights.’”¹⁴⁶ Second, scholars always have the option to weigh the benefits and costs of transparency about their distributional mapping and decide not to be transparent and not to air “dirty laundry.”¹⁴⁷ Esquirol calls this “the distributional analysis of *doing distributional analysis*.”¹⁴⁸ If, after a careful distributional analysis a scholar believes that rhetoric of hellfire and damnation, or at the opposite end, silence, will best produce a beneficial state of affairs, then so long as the costs of such tactics are factored into the equation, the scholar can use them.

A related concern may be that it is impossible to get the analysis “right.” It seems absolutely unworkable to map all the interests of every person within every structure, paying attention to overlapping and conflicting interests and structures. Imagining it otherwise feels like it requires a crystal ball. Indeed, distributional analysis necessarily lives in the interstices—it is contestable, in contest with itself, and messy. However, once we realize that mapping interests and imagining it otherwise is what we already do, albeit for the most part instinctively and incompletely, the task seems a bit less daunting.¹⁴⁹ There is no precise formula for how many interests is enough or how to accurately envision the ripples caused by a legal change. In fact, getting the formula “right” is less important than just trying the method. In our current era of punitivity, where substantive criminal theorizing has become peculiarly devoted to uncovering harms and instantly prescribing criminalization, progressive scholarship benefits from the mere attempt to account for multiple interests and self-consciousness regarding the frames in which the interests are charted. Distributional analysis, I believe, represents a union of the empirical and normative, of the perspectival and scientific—a union that counters the punitive impulse and

145. Esquirol, *supra* note 13, at 162.

146. *Id.* at 162–63.

147. See Darren Lenard Hutchinson, *Beyond the Rhetoric of Dirty Laundry: Examining the Value of Internal Criticism Within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185, 187 (1999).

148. Esquirol, *supra* note 13, at 163.

149. See *id.* at 162 (“As it is commonly performed in legal analysis, distributional analysis is mostly based on a gut intuition, or an impressionistic sense of both the effects of legal rules and their ultimate consequences on different constituencies.”).

helps move discussions of criminal law and policy away from the peculiar institution that is the American penal state.